

Aug 26, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RECHAEEL DRIVER,

Plaintiff,

v.

COURTYARD SPOKANE
DOWNTOWN AT THE
CONVENTION CENTER, an unknown
business entity; COURTYARD
MANAGEMENT CORPORATION, a
Delaware corporation; MARCOURT
INVESTMENTS INCORPORATED, a
Maryland corporation; and DOES 1–50,

Defendants.

No. 2:17-cv-00303-SMJ

**ORDER ENFORCING SANCTION
FOR DEFENDANTS' FAILURE
TO OBEY SCHEDULING ORDER**

At the pretrial conference held on August 20, 2019, the Court granted Plaintiff Rechael Driver's request for clarification and ruled Defendants Courtyard Spokane Downtown at the Convention Center, Courtyard Management Corporation, and Marcourt Investments Incorporated (the "Hotel Defendants") are precluded from presenting an "empty chair" defense at trial. ECF No. 384 at 1. This Order memorializes and supplements the Court's oral ruling.

The Hotel Defendants pleaded the affirmative defense that (1) "Plaintiff's damages, if any, were caused or contributed to by Co-Defendants [Jason] Pedigo

1 and Clarkson-Davis. Therefore, any award made in favor of Plaintiff in this case
2 must be reduced by an amount equal to the percentage of fault of others in causing
3 or contributing the damages alleged in the Complaint” and (2) “Plaintiff’s
4 damages, if any, were caused or contributed to by Co-Defendant Pedigo’s criminal
5 conduct.” ECF No. 33 at 10.

6 The Court issued its Scheduling Order on March 27, 2018. ECF No. 83. In it,
7 the Court ordered, “[e]ach party shall file and serve a notice **no later than one week**
8 **after the discovery cut-off** indicating which previously-plead claims and/or
9 affirmative defenses will be adjudicated at trial.” *Id.* at 5.

10 The Court issued an Amended Scheduling Order on October 23, 2018. ECF
11 No. 138. The Court continued trial and extended remaining pretrial deadlines. *Id.* at
12 2–3. The Court reset the discovery cutoff to April 16, 2019 and reminded the parties
13 to file their “Notice of To-Be-Adjudicated Claims and Affirmative Defenses” no
14 later than “**1 Week After Discovery Cutoff**,” or by April 23, 2019. *Id.* at 2. The
15 Court expressly declared, “[a]ll other . . . procedures set forth in the Court’s March
16 27, 2018 Scheduling Order, ECF No. 83, remain unchanged.” *Id.*

17 The Hotel Defendants’ did not file a notice of their to-be-adjudicated
18 affirmative defenses by April 23, 2019, or at any other time. Nor did they seek leave
19 to extend their deadline for doing so. The Hotel Defendants have repeatedly failed
20 to comply with the Court’s deadlines and procedures on other occasions. *See, e.g.,*

1 ECF Nos. 134, 201, 212, 222, 223, 282, 283, 289, 353.

2 Plaintiff moved to preclude the Hotel Defendants from presenting their
3 affirmative defenses, arguing “they should be precluded from doing so due to their
4 failure to again follow this Court’s Scheduling Order.” ECF No. 301 at 5. The Hotel
5 Defendants responded, acknowledging Plaintiff’s motion would, if granted, extend
6 to “evidence regarding the empty chair defense.” ECF No. 324 at 7.

7 The Court issued its Order Ruling on Motions *in Limine* on July 3, 2019. ECF
8 No. 379. In it, the Court granted Plaintiff’s motion and ruled, “Defendants may not
9 seek adjudication or determination of any affirmative defenses, although they may
10 certainly undermine Plaintiff’s ability to meet her burden of proof.” *Id.* at 3 (citing
11 Fed. R. Civ. P. 16(f), 37(b)(2)(A)(ii)). The Hotel Defendants did not move for
12 reconsideration of this order and the July 17, 2019 deadline to do so has passed.¹
13 *See* ECF No. 83 at 11.

14 Despite the Court’s earlier ruling, the Hotel Defendants nevertheless
15

16 ¹ On August 23, 2019, the Hotel Defendants moved for reconsideration of the
17 Court’s oral clarification provided on August 20, 2019. *See* ECF No. 387. This oral
18 clarification merely enforced the Court’s written order issued on July 3, 2019 and
19 is not itself the proper subject of a motion for reconsideration. To the extent the
20 Hotel Defendants seek reconsideration of the written order, their motion is untimely
and violates the Court’s deadlines and procedures. *See* ECF No. 83 at 11 (“[A]ny
Motion to Reconsider shall be filed no later than fourteen (14) days after the filing
date of the Order which is the subject of the motion Counsel shall follow Civil
Rule 7(h) of the Local Rules for the United States District Court for the Western
District of Washington.” (emphasis omitted)). The motion is denied.

1 attempted to advance the empty chair defense in their list of witnesses, exhibits, and
2 deposition designations. *See* ECF No. 323 at 6–7, 9; ECF No. 326 at 2, 5–6; ECF
3 No. 375 at 11–12, 15–17. Plaintiff sought clarification on whether the Court’s prior
4 order encompasses the empty chair defense. ECF No. 382 at 2–3. The Hotel
5 Defendants similarly sought clarification on whether former Defendants Pedigo and
6 Clarkson-Davis will appear on the verdict form. ECF No. 383 at 14.

7 The empty chair defense is no different than a nonparty’s comparative fault,
8 which is an affirmative defense under Washington law. *See* Wash. Rev. Code
9 § 4.22.070(1); Wash. Super. Ct. Civ. R. 12(i); 6 Wash. State Supreme Court Comm.
10 on Jury Instructions, *Washington Practice Series: Washington Pattern Jury*
11 *Instructions—Civil* WPI 21.10 & note, cmt. (7th ed. 2019 update). Regardless of
12 what the Court’s pre-July 3, 2019 orders may have said, it should have been clear
13 to the Hotel Defendants that they are now precluded from advancing the empty chair
14 defense and the jury will not consider any nonparty’s comparative fault.

15 Accordingly, **IT IS HEREBY ORDERED:**

16 **1.** At trial, the Hotel Defendants may not present evidence on, or seek
17 adjudication or determination of, any affirmative defenses, including
18 but not limited to the affirmative defense of a nonparty’s comparative
19 fault, also known as the “empty chair” defense.

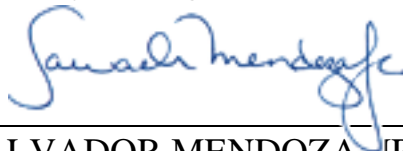
20 **2.** Former Defendants Pedigo and Clarkson-Davis shall not appear on the

1 verdict form.

2 **3.** The Hotel Defendants' Motion to Reconsider, **ECF No. 387**, is
3 **DENIED.**

4 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
5 provide copies to all counsel.

6 **DATED** this 26th day of August 2019.

7 

8 SALVADOR MENDOZA, JR.
9 United States District Judge